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appeared that the defendant who was seeking to redeem from a sale of his property made upon a notice published in a newspaper, while he was an enemy within the Confederate lines, had voluntarily gone thither from a Northern State to assume the hostile character, relief would be denied. While a person choosing to become a traitor, and leaving the North for that purpose, would be morally more culpable than one who, residing at the South, should have been driven into treason, perhaps, by overwhelming force, it is not clear that a different rule should be applied to the two, unless, perhaps, it should appear that the purpose of assuming the hostile character was to oust the court of jurisdiction. Why should a harder measure of justice be meted to a traitor becoming such voluntarily north, than to one becoming such in like manner south, of a given line? The facts are not very fully stated, but it seems that the defendant's family went from Illinois, after the outbreak of the war, to reside in Kentucky, but that the defendant himself, before the war, went from one of the western territories to a Southern State, where he afterwards joined the rebel army, voluntarily, as he admitted, and from a sense of duty. If these were the facts, the hypothesis of his having voluntarily gone South to enter the rebel army, was unfounded, and it is still harder to accept the decision as

authoritative: *Harper v. Ely*, 2 Chicago Leg. News 350, with which compare *Mrs. Alexander's Cotton*, 2 Wal. 404, 419, in which the court declare, that the personal dispositions, that is, I suppose, the political sympathies, of parties will not be inquired into, in questions of capture, but rather their domicil or residence.

The question, to what remedy a party is entitled, who is aggrieved by a wrongful assumption of jurisdiction, in this class of cases, is not always an easy one to answer. If, as in *Mixer v. Sibley*, the error appeared on the record, it might be corrected, upon writ of error, in the appellate court, if the writ were sued out in apt time. But where, as seems to have been true in the Maryland cases, the record did not show to the lower court the hostile character of the party proceeded against, the judgment or decree would, on its face, appear to be valid, and would doubtless be so held on appeal—unless, indeed, the facts were admitted in the appellate court, and a decision invoked, as though they appeared of record. To reverse such a judgment, the injured party must have recourse to a bill in chancery, as, a bill in the nature of a bill of review, or a bill to redeem, or to some other proceeding appropriate, under the circumstances, according to the local law.

J. A. J.

Supreme Court of the United States.

THE STATE OF TEXAS *v.* WHITE ET AL.

THE STATE OF TEXAS *v.* RUSSELL, EXECUTOR, ET AL.

An attorney or solicitor, who is also counsel in a cause, has a lien on moneys collected therein for his fees and disbursements in the cause, and in any suit or proceeding brought to recover other moneys covered by the same retainer.

If the attorney is guilty of no bad faith or improper conduct, and claims to

have a fair set-off against his client, which the latter refuses to allow, a motion to pay into court the moneys collected will not be granted, but the parties will be left to their action.

A party has a general right to change his attorney, and a rule for that purpose will be granted, leaving to the attorney the advantage of any lien he may have on papers or moneys in his hands as security for his fees and disbursements.

IN the first of these cases a motion was made for an order on George W. Paschal, lately counsel for complainant, to pay to the clerk of this court, for the benefit of complainant, the sum of \$47,325 in gold, alleged to have been received by him under the decree in the case. In the other case motion is made that the name of said Paschal be stricken from the docket as counsel for the complainant, and that he be forbidden to interfere with the case. Rules to show cause having been granted, with leave to either party to file affidavits, the respondent, Paschal, at the return of the rules, filed a statement, under oath, by way of cause why the motions should not be granted.

T. J. Durant, for the motions.

A. G. Riddle, contrâ.

The opinion of the court was delivered by

BRADLEY, J.—The application for an order on the respondent to pay money into court is in the nature of a proceeding as for a contempt. The application is based upon the power which the court has over its own officers, to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. For such improper conduct the court may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duty, under pain of discharge or imprisonment. The ground of the jurisdiction thus exercised is the alleged misconduct of the officer. If an attorney have collected money for his client, it is *prima facie* his duty, after deducting his own costs and disbursements, to pay it over to such client; and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdic-

tion to compel him to pay the money, in conformity with his professional duty. The application against him in such cases is not equivalent to an action of debt or assumpsit, but is a quasi criminal proceeding, in which the question is not merely whether the attorney has received the money, but whether he has acted improperly and dishonestly in not paying it over. If no dishonesty appears the party will be left to his action. The attorney may have cross-demands against his client, or there may be disputes between them on the subject, proper for a jury or a court of law or equity to settle. If such appear to be the case and no professional misconduct be shown to exist, the court will not exercise its summary jurisdiction. And, as the proceeding is in the nature of an attachment for a contempt, the respondent ought to be permitted to purge himself by his oath. "If he clear himself by his answers," says Justice Blackstone, "the complaint is totally dismissed :" 4 Com. 288.

The answer of the respondent in this case sets forth the history of the litigation instituted for the recovery of the Texas indemnity bonds and the part taken by him therein, both in the two cases in which these motions are made and in other cases and proceedings. A portion of this history is published in the report of *Texas v. White*, 7 Wallace 700.

The answer admits that the respondent has received the sum alleged, viz., \$47,325 in gold, paid under the decrees of this court, but alleges that his disbursements have been \$13,355.98 (of which he gives an account by items), and that his charge for services is \$20,000 in the case of *Texas v. White, Chiles et al.* alone, the reasonableness of which charge is corroborated by affidavits of highly respectable counsel, and the balance and much more he claims to be due to him from the state of Texas for his services in relation to others of this same lot of indemnity bonds, for the recovery of which he was originally retained by the governor of Texas, as well as for other matters specified in the answer, into the merits of which it is not necessary for us to go, inasmuch as neither party has asked this court to settle or liquidate the accounts between them. All that we are concerned to ascertain and decide on this motion is, whether the respondent retains the money in his hands in bad faith, and is therefore guilty of any such misconduct as will justify the court in interposing its authority in a summary way.

It appears by the answer that at the breaking out of the rebellion there were in the treasury of Texas seven hundred bonds of the United States, of \$1000 each, belonging to the school fund of the state, and known as the Texas indemnity bonds, being part of the \$5,000,000 of bonds delivered to the state at the time of its admission into the Union. These bonds had not been endorsed by any governor of the state, as was required to make them negotiable, but the military board nevertheless disposed of them for the purpose of aiding in carrying on the war. One hundred and thirty-six of these bonds came into the hands of White, Chiles, and Others; about one hundred and fifty came into the hands of Peabody & Co.; and various others into the hands of other persons. It was claimed by these parties that, having received the bonds in good faith, they were entitled to be paid their full amount by the government of the United States, and many of them were so paid. But it is claimed by the answer that, by the indefatigable exertions of the respondent payment was stopped on a large number of the bonds, and suits were instituted against the parties who had received them or had received the money secured by them. The respondent was employed by A. J. Hamilton, the provisional governor of Texas in 1865, to carry on these prosecutions. He first commenced a suit against White, Chiles, and Others, in Texas, but, not being able to serve them with process, he removed his operations to Washington, and there commenced the suit in which the money in question was recovered. He also took the proper steps and presented elaborate arguments in the Treasury Department to prevent a redemption of the bonds and to render the prosecution effectual, being partially successful in this object, as before mentioned. No stipulation was made with Governor Hamilton for any certain fee for these services, but it was understood between them that the respondent should charge such fees as the responsibility, expense, time, skill, and services should render proper. On the faith of this understanding the respondent left his home in Texas, where his practice was lucrative, and came to the North to attend to this business. For a time, on a change of local administration in Texas, other counsel were employed in the cases, but never, as it appears, to the entire displacement of the respondent; and in December 1867, he received the following special engagement from E. M. Pease, then Governor of Texas: "Executive of Texas, Austin, December 3d 1867, George W. Paschal, Esq.,

Dear sir: Your two letters of the 9th and 14th of November came together a day or two since. I had intended to write you before this, and ask you to make a thorough examination of the suit at Washington in behalf of the state against Chiles and Others for certain United States bonds belonging to the school fund of Texas, but a great press of business has prevented me from doing it. I now wish you to make such an examination, and make a full report thereon to this office as early as possible. In the mean time you are fully authorized to take charge of and represent the interest of the state in said suit. Your compensation will be dependent upon the action of a future legislature, unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received. Yours, with respect,
E. M. PEASE." The power of the governor to make such an arrangement is not disputed. The legislature, in October previous, had passed an act expressly authorizing the governor to take such steps as he might deem proper to recover possession of these bonds, and to compromise with the parties holding them or through whose hands they had passed. The respondent accepted these terms, and continued to manage and conduct the subsequent litigation, both in this case of White, Chiles, *et als.*, and other cases. In addition to the above letter, Governor Pease, on the 13th of November 1868, executed to the respondent a power of attorney, constituting him his agent and attorney in fact, to represent the state of Texas in any suits then pending or thereafter to be instituted in any courts in the District of Columbia in relation to any of the said bonds, with power to settle and compromise with any of the parties. Under these various retainers and engagements the respondent gave his attention for several years to the recovery of the bonds, and finally succeeded in recovering the amount before mentioned from the defendants in the case of White, Chiles and Others, and made considerable progress in negotiating a settlement of those which had come to the hands of Peabody & Co. In June 1869, Governor Pease visited Washington; and, on being made acquainted with the respondent's proceedings, approved of the same, and entered into a further arrangement with him in relation to three hundred of the said bonds which had been carried to Europe by one Swisher (of which the Peabody bonds were a part), by which he agreed that the respondent should be paid, for carrying the litigation through, twenty-five per cent. on the one hundred and forty-nine bonds received

by Peabody & Co., and twenty per cent. on the remainder, being one hundred and fifty-one bonds in the hands of Droege & Co. Under this arrangement the respondent continued his negotiations with these parties, and was, as he believed, near effecting a satisfactory arrangement and settlement with them, when, on or about the 27th of January 1870, he received a telegram from Edmund J. Davis, who had been appointed provisional governor of Texas in place of Governor Pease, that his appointment as agent for the state of Texas was revoked. A letter from the governor was received shortly after, containing a formal revocation of the respondent's authority as such agent and of the power to represent the governor of Texas given to him by Governor Pease. The respondent alleges that this interference on the part of Governor Davis put an end to the negotiations for a settlement with Droege & Co., and Dabney, Morgan & Co. (who had received the money on the Peabody bonds), and was entirely unauthorized by the governor, and entitles the respondent to receive the contingent fees of twenty-five and twenty per cent., as before mentioned, and to continue as attorney and counsel in the case until his demand is settled.

The respondent also claims that the state of Texas is indebted to him in a balance of \$17,577 for publishing, binding, and delivering to the secretary of state of Texas four hundred copies each of five volumes of reports of the decisions of the Supreme Court of Texas, which he reported under the laws of the state. He also claims that the state owes him \$1000 for bringing two suits in the District Court of Travis county, Texas, and prosecuting appeals therein to the Supreme Court of the state.

On the part of the state of Texas it is shown, not only that the governor revoked Mr. Paschal's authority, but that he has appointed Mr. Durant as attorney and agent of the state in his stead, with authority to receive all moneys due to the state; and that Mr. Durant has made due demand of Mr. Paschal for the moneys in his hands, and has required him not to intermeddle further in the suit of *Texas v. Russell, Executor of Peabody, et al.*

Upon a consideration of the facts disclosed by the answer and affidavits, the result to which the court has come, in relation to the money retained by the respondent, is, that he has not been guilty of any misconduct which calls for the exercise of summary jurisdiction. We see no reason to suppose that he is not acting in good faith; and whether his claim to the entire amount be

valid or not (a point which we are not called upon to decide), it is clear that the claim is honestly made. The case is one in which the parties should be left to the usual remedy at law, where the questions of law and fact which are mooted between them can be more satisfactorily settled than they can be in a summary proceeding.

A good deal has been said in the argument on the question whether the respondent has, or has not, a lien on the moneys in his hands. We do not think that the decision of this motion depends alone on that question. For, even if he has not a *lien* co-extensive with the sum received, yet if he has a fair and honest set-off, which ought in equity to be allowed by the complainant, that fact has a material bearing on the implied charge of misconduct which underlies the motion for an order to pay over the money; and when, as in this case, there exists a technical barrier to prevent the respondent from instituting an action against his client (for it is admitted that he cannot sue the state of Texas for any demand which he may have against it), it would seem to be against all equity to compel him to pay over the fund in his hands, and thus strip him of all means of bringing his claims to an issue. Whilst, on the other hand, no difficulty exists in the state instituting an action against him for money had and received, and thus bringing the legality of his demands to a final determination.

But in the judgment of the court the respondent has a lien upon the fund in his hands for at least the amount of his fees and disbursements in relation to these indemnity bonds. His original retainer by Governor Hamilton related to all the bonds indiscriminately, and much of the service rendered by him has been rendered indiscriminately in relation to them all. With regard to the White and Chiles bonds the agreement of Governor Pease was express, that in case of recovery the respondent might retain his compensation out of the amount received. In England, and in several of the states, it is held that an attorney or solicitor's lien on papers or money of his client in possession extends to the whole balance of his account for professional services. But whether that be or be not the better rule, it can hardly be contended that in this case it does not extend to all the fees and disbursements incurred in relation to all of these indemnity bonds. And in this country the distinction between attorney or solicitor and counsel is practically abolished in nearly all the states. The

lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and the other cannot be well distinguished; and, as a general rule, counsel fees, as well as those of attorney or solicitor, constitute a legal demand, for which an action will lie. And whilst, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client a different rule obtains. The claim of the attorney or solicitor in the latter case, even in England, extends to all proper disbursements made in the litigation, and to the customary and usual fees for the services rendered.

The fee bill adopted by Congress in 1853 recognises this general rule, and, in fact, adopts it. By the first section of that act it is expressly declared that nothing therein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

The change in the rule relative to fees and costs has been gradually going on for a long period. In Pennsylvania counsel fees could not be recovered in an action so late as 1819, when the case of *Mooney v. Lloyd*, 5 S. & R. 411, was decided. But in the subsequent case of *Foster v. Jack*, decided in 1835, 4 Watts 334, the contrary was held, in a very able opinion delivered by Chief Justice GIBSON. And in *Balsbaugh v. Fraser*, 19 Penna. 95, Chief Justice BLACK delivered the opinion of the court in a series of propositions which strongly commend themselves for their good sense and just discrimination. The court there held that in Pennsylvania an attorney or counsellor may recover whatever his services are reasonably worth; that such claim, like any other which arises out of a contract, express or implied, may be defalked against an adverse demand; that an attorney, who has money in his hands which he has recovered for his client, may deduct his fees from the amount; that if he retain the money with a fraudulent intent, the court will inflict summary punishment upon him; but if his answer to a rule against him convinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial.

In New York counsel fees have always been recoverable on a *quantum meruit*: *Stevens & Cagger v. Adams*, 23 Wend. 57; s. c., 26 Wend. 451. In this case Stevens recovered \$300 for counsel fees and \$50 for maps made to be used in a cause. It was held by the court that the fee bill, which declares it unlawful to demand or charge more than therein limited, has reference only to the question of costs as between party and party, and not as between counsel and client. The arguments of Chancellor Walworth and Senators Lee and Verplanck, in the court of errors, on the general subject, were exceedingly lucid and able, going to show that in this country the counsellor is regarded as entitled to a fair remuneration for his services, and to recover the same in an action, either upon an express or implied contract. The Code has since abolished the fee bill, and left attorneys and solicitors to make their own bargains with their clients. But the courts have held that this change has not affected the attorney's lien, even on the judgment recovered, for the amount which it has been agreed he shall receive. In one case he was to receive one-half the amount to be recovered. Judgment was obtained for \$1179, and the court held that the attorney had a lien on this judgment for his half of it, and that the defendant could not safely settle with the plaintiff without paying him: *Rooney v. Second Avenue Railroad Co.*, 18 N. Y. Rep. 368.

In Texas the law has been held substantially the same. In the case of *Casey v. March*, 30 Texas 180, it was decided that an attorney has a lien on the papers and documents received from his client, and on money collected by him in the course of his profession, for the fees and disbursements on account of such claims, and for his compensation for his services in the collection of the money. If, as the respondent contends, this case is to be governed by the law of Texas, it is decidedly in favor of his lien, at least to the extent of his services and disbursements in relation to the indemnity bonds. (See the cases of *Kinsey v. Stewart*, 14 Texas 457; *Myers v. Crocket*, Id. 257; *Ratcliff v. Baird*, Id. 43; *Hill v. Cunningham*, 25 Texas 25.) As the original retainer was made in Texas, we are inclined to the opinion that the rights of parties are to be regulated by the laws of that state. But, if this be not the case, this court would be guided by what it deems to be the prevailing rule in this country; and, according to this rule, we are of opinion that the respondent has a lien on

the fund in his hands for his disbursements and professional fees in relation to the indemnity bonds; and that, in retaining the said fund for the purpose of procuring a settlement of his claim, he has done nothing to call for the summary interposition of this court.

The motion for an order to compel the respondent to pay to the clerk of this court the money received by him, is therefore denied.

The other motion we think should be granted. The respondent, as appears from his answer, was employed by Governor Pease to proceed with and carry through the litigation relating to the three hundred bonds in the hands of Peabody & Co. and Droege & Co., with a stipulation to receive twenty-five per cent. of the amount that might be recovered on one hundred and forty-nine of the bonds, and twenty per cent. of the amount to be recovered on the remainder. Granting it to be true that this contract was definitely concluded (although there seems to have been some uncertainty as to one part of it), it cannot be seriously claimed that the complainant is so fixed and tied up by the arrangement that it cannot change its attorney and employ such other counsel as it may see fit, always being responsible, of course, for the consequences of breaking its contract with the respondent. Whether in discharging him the state has made itself liable for the whole contingent fee agreed upon, or only for so much as the respondent's actual disbursements and services were worth up to the time of his discharge, or for nothing whatever, it is not necessary for us to decide. That question can be more properly determined in some other proceeding instituted for the purpose. The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interests must necessarily suffer. Whether in any case, in virtue of an agreement made, an attorney may successfully resist an application of his client to substitute another in his place, we need not stop to inquire. In this case one of the states of this Union is the litigant, and moves to change its attorney for reasons which are deemed sufficient by its responsible officers. It is abundantly able, and it must be presumed will be willing, to compensate the respondent for any loss he may sustain in not being continued in the management of the cause. The court cannot hesitate in permitting the state to appear and conduct its causes by such counsel as it shall choose to represent it, leaving the respondent to such remedies, for the redress of any

injury he may sustain, as may be within his power. Under the decision which we have just made in relation to the money in his hands, he will be able to retain that fund and any papers and documents belonging to his client until his claim shall be adjudicated in such action as the state may see fit to institute therefor.

An order to discharge the respondent as solicitor and counsel for the complainant in the second case will be granted.

No costs will be allowed to either party on these motions.

The subject of the lien of attorneys and counsel for fees will be found exhaustively discussed in the note to *Carpenter v. Sixth Av. Railroad Co.*, 1 Am. Law Reg. N. S. 410, and the right of counsel in the American states to sue for fees, in the note to *Kennedy v. Broun*, 2 Am. Law Reg. 357.

Supreme Court of Pennsylvania.

CATHARINE ALTER'S APPEAL.

Where two persons agreed to make mutual wills, but by mistake each signed the will of the other, and one died: *Held*, that he died intestate.

There being no will to reform, the legislature could not give a court power to establish it upon proof of the intent of the parties; such an act would be the divesting of a vested estate.

THIS was an appeal by Catherine Alter from the decree of the Register's Court of the county of Philadelphia.

The facts are stated in the opinion of the court, which was delivered by

AGNEW, J.—This is a hard case, but it seems to be without a remedy. An aged couple, husband and wife, having no lineal descendants, and each owning property, determined to make their wills in favour of each other, so that the survivor should have all they possessed. Their wills were drawn precisely alike, *mutatis mutandis*, and laid down on a table for execution. Each signed a paper, which was duly witnessed by three subscribing witnesses; and the papers were enclosed in separate envelopes, endorsed and sealed up. After the death of George A. Alter, the envelopes were opened, and it was found that each had, by mistake, signed the will of the other. To remedy this error, the legislature, by an act approved the 23d of February 1870, conferred authority upon the Register's Court of this county to take proof of the mistake and proceed as a court of chancery to reform the will of